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Domestic Relations

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period of time sufficient to establish a standard for reasonably ascertaining potential future profits.[20] Only one decision in Washington specifically allowed recovery for loss of goodwill; it is distinguishable because a malicious, willful destruction of property and business operations, and not conversion, was involved.[21] The Court there stated that such facts did not require the usual degree of exactness in determining the total amount of the loss suffered. However, even in that case the plaintiff's evidence was quite detailed as to receipts, expenses and profits of the business for some time prior to its interruption.

The Court's decision in this case has weakened considerably its position that the value of goodwill cannot be recovered in a conversion action. Also, under the facts of the instant case, the jury, and in turn, the Court, in awarding damages, had to rely on opinion evidence of a highly speculative nature which has little probative value.

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Lease—Construction of Liquidated Damages Provision. In *Mon Wai v. Parks*, 143 Wash. Dec. 518, 262 P.2d 196 (1953), the plaintiff lessors sought to collect from the defendant lessees unpaid rent which had accrued prior to the termination of the lease. The lease, which had been terminated for breach of covenant to pay, provided that in event of the lessees' failure to carry out the terms of the lease, lessors should have the option to terminate, "and all moneys paid by the Lessees to the Lessors shall be forfeited as liquidated damages to Lessors." In reversing judgment for plaintiff, the court held that by this provision, the parties limited lessors' damages, upon termination for breach, to moneys paid by lessees as their contribution toward construction of building on demised premises, and that therefore the lessor could not recover overdue rent.

DOMESTIC RELATIONS

Disposition of Property in Divorce. In *High v. High*[1] all of the property before the court for disposition was held by the parties as tenants in common. The trial court awarded certain property to each of the parties, and in addition ordered that three tracts of land be sold by the parties within six months, recognizing that the tracts had been bought by the parties for speculation, were practically valuless now, but might become valuable at a later time. If not sold within the six months period, either party had the right to apply for an order of the court to have the property sold at public sale.

The Supreme Court reversed that portion of the decree providing

[20] Hole v. Unity Petroleum Corp., 15 Wn.2d 416, 131 P.2d 150 (1942). Bogart v. Pitchless Lumber Co., 72 Wash. 417, 130 Pac. 490 (1913).
[21] Seidell v. Taylor, 86 Wash. 645, 151 Pac. 41 (1915).
[1] 41 Wn.2d 811, 252 P.2d 272 (1953).

for an order of sale, on the grounds that it was an abuse of discretion. Stating that the problem was one of first impression in this state,[2] the court held that the trial court may not, in a divorce proceeding, order a sale of property held by the parties as tenants in common, citing as authority In re *Carroll*,[3] a California case.

It should be noted that the *Carroll* case is based on a statute[4] giving the court in a divorce proceeding the power to *partition or sell community property* of the parties, and the decision prohibits the application of that statute to property held by the parties as tenants in common, making for a very narrow holding. The Washington statute[5] provides that the court shall make a just and equitable disposition of all the property of the parties to a divorce action, both community and separate, without specifying any manner of disposition. Cases decided under the Washington statute demonstrate that the discretion of the trial court in this regard is very broad.[6] Since the statutes are not comparable, it is questionable if the California case is authority for the ruling in the principal case.

It would seem, further, that this restriction on the power of the court was not essential for the disposal of the case. In *Wells v. Wells*,[7] decided in 1924, and noted in the principal case, it was held not to be an abuse of discretion to award a producing ranch to the parties as tenants in common, where it served the best economic interests of the parties. In the principal case, the decision rested on the fact that the tracts had been bought for speculation and it would be to the best economic interests of the parties not to sell at this time, which would bring the case directly within the holding of *Wells v. Wells*.

However, in *Shaffer v. Shaffer*,[8] subsequent to the *High* decision, it appears that the court ignored the essence of both the *High* and *Wells* cases. There the principal property before the court for disposition was an apartment building in which each of the parties had an interest. The court made no determination as to the kind of property, but noted

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[2] *Cf.* McLaughlin v. McLaughlin, 143 Wash. Dec. 101, 260 P.2d 875 (1953). The trial court awarded an undivided one-half interest in the property to the parties, with the further order that the property should be disposed of by agreement between them within six months, and if not by that date, then "said property shall be sold and the proceeds divided between the parties." This, however, was not made an issue in the case, and was not decided by the Supreme Court.

[3] 133 Cal. App. 672, 28 P.2d 84 (1933).

[4] CAL. CIV. CODE § 147 (Deering 1944).

[5] RCW 26.08.110.

[6] Holm v. Holm 27 Wn.2d 456, 178 P.2d 725 (1947).

[7] 130 Wash. 578, 228 Pac. 692 (1924).

[8] 143 Wash. Dec. 579, 262 P.2d 763 (1953).

that apparently it had belonged to the wife as separate property at the time of coveture, and that the husband had made improvements on it. The trial court awarded the property to the parties as tenants in common, which award the Supreme Court reversed on the grounds that it put the property into the same class as community property not brought before the court, and that it did not finally determine the rights of the parties after the divorce, a subsequent partition action being necessary. The court stated that such an award was not a performance of the court's statutory duty to dispose of the property brought before it.[9]

These three cases would seem to be the leading cases in the field of property disposition in divorce actions. However, even when narrowed to the facts in each instance, the holdings would appear to be inconsistent.[10]

The *Shaffer* case would also seem to be inconsistent with *Nelson v. Nelson*,[11] another 1953 case, in which the court recognized, in principle at least, the discretion of the trial court to award property to the parties as tenants in common. There the main issue was custody of teen-age children, but the court recognized that the home of the parties had been awarded to the parents as tenants in common, with sole right of possession in the wife during the minority of the children and a provision that the husband should pay a mortgage against the property. There was no discussion as to the propriety of the trial court's making such a disposition of the property; rather, the decree was affirmed with the added provision that the mortgage payments were to become a lien on the proceeds from the sale of the property, if and when sold. Thus, it would seem that in the *Nelson* case the awarding of the property to the parties in common was acknowledged to be a proper performance of the court's statutory duty.

Alimony in Lieu of Social Security Benefits. In *Patrick v. Patrick*[12] the parties were each granted a divorce by the trial court, and a

[9] ". . . and making such disposition of the property of the parties, either community or separate, as shall appear just and equitable . . ." *supra* note 5.

[10] (1) Property held as tenants in common at the time of divorce cannot be ordered sold by the court. High v. High, *supra* note 1. (2) It is not an abuse of discretion to award community property to parties as tenants in common where there is a showing of economic reason therefor. Wells v. Wells, *supra* note 7. (3) It is the duty of the divorce court, by statute, to dispose of all the property of the parties, and it is not a performance of that duty to award property to the parties as tenants in common. Shaffer v. Shaffer, *supra* note 8.

[11] 143 Wash. Dec. 257, 260 P.2d 886 (1953).

[12] 143 Wash. Dec. 128, 260 P.2d 878 (1953).

property division was made on the basis of their separate property. The husband's property consisted principally of two large trusts of which he was beneficiary; the wife's property comprised gifts made to her by her husband during marriage. Funds earned by the husband during coveture were deemed to have been dissipated on living expenses during the marriage. The trial court refused to grant the wife alimony, which claim she made on the sole basis that community funds had gone into payment of social security taxes from which she would receive no benefit by virtue of this divorce.

The Supreme Court affirmed the decree except with respect to the claim for alimony and allowed the wife $50 per month alimony, stating:

> . . . (W)e believe the court erred in failing to make some provision for reasonable alimony to the wife, since, in our opinion, appellant should be compensated in some manner for her potential interest in the Social Security benefits of the husband as to which, under federal law, she will lose all rights by virtue of the divorce.[13]

The general rule is that in determining the *ability* of the husband to pay alimony, the consideration of expectations is permissible.[14] In a Washington case[15] for separate maintenance, the court took into consideration the fact that the husband would retire from the Navy within a month, and awarded a certain sum for separate maintenance until retirement with a reduction on retirement. And in a New Jersey case,[16] the court included the husband's social security benefits in determining his ability to pay alimony on his application for reduction of the payments. That case, however, should be distinguished in that he was at the time receiving the social security benefits.

The decision is difficult to justify on the basis that the husband will receive benefits which should by right accrue to the wife. It assumes that the husband will acquire the social security benefits, and yet he was at the time of the trial forty-eight years of age and in poor health. It also awards to the wife at the present time benefits which she would not, if married, receive until her husband reached the age of sixty-five. Further, it is possible that under the circumstances of this case she would never be eligible for a wife's benefit under the Social Security Act.

Assuming that the parties were married when the husband reached

[13] *Id.* at 132, 260 P.2d at 881.
[14] 66 A.L.R. 219 (1929).
[15] Holland v. Holland, 139 Wash. 424, 247 Pac. 455 (1926).
[16] Sassman v. Sassman, 1 N.J. Super. 306, 64 A.2d 357 (1949).

the age of sixty-five, the total maximum benefit which an individual may receive under the Act is $80 per month.[17] This maximum amount, however, is based on continuous employment at a wage of $300 or more per month. The evidence in this case shows that the husband has spent several periods in a sanitarium, and there is no showing that he is working at the present time. Therefore, by the time he reaches the age of sixty-five, he may be entitled to far less than $80 per month.

The maximum insurance benefit for a wife is equal to one-half of the old-age insurance benefit of her husband.[18] It is thus apparent that the allowance of $50 per month to the wife is in excess of even her maximum expectation under the Social Security Act. Further, a wife's insurance benefit is dependent on the fact that she herself is not entitled to old-age insurance benefits of more than this amount. The court states that the wife had worked. If she were covered by social security for a period of forty quarters before she was sixty-five, her average monthly earning would be computed, and she would be entitled to either her benefit as an individual, or to her wife's benefit, whichever was the greater.[19]

However, it should be noted that under the Act, if the husband dies before the age of sixty-five, being fully insured as defined in the Act, his widow, upon attaining the age of sixty-five may make a claim in the amount of three-fourths of the primary insurance amount of her deceased husband.[20] Under these circumstances, the highest amount to which she would ever be entitled is $60.00 per month,[21] dependent on her ineligibility to receive a greater benefit as an individual.[22] This right of the wife is lost if she was not living with the husband at the time of his death.[23]

The court in the *Patrick* case has ruled that this forfeiture of a right to make a claim is sufficient ground for an award of alimony to the wife, even though the right of claim is contingent on (1) the death of the husband, (2) the amount of his social security contributions, (3) her reaching the age of sixty-five, and (4) not being eligible for benefits herself.

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[17] *Expanded Social Security,* The Bureau of National Affairs, Inc., Retirement Benefits Computer, 34 (1950).
[18] 64 STAT. 477 (1950), 42 U.S.C.APP. § 402 (b) (2) (Supp. 1946).
[19] 64 STAT. 477 (1950), 42 U.S.C.APP. § 402(b) (1) (D) (Supp. 1946).
[20] 64 STAT. 477 (1950), 42 U.S.C.APP. § 402(e) (2) (Supp. 1946).
[21] *Supra* note 17, Security Benefits Computer, 35.
[22] 64 STAT. 477 (1950), 42 U.S.C.APP. § 402(e) (1) (E) (Supp. 1946).
[23] 64 STAT. 477 (1950), 42 U.S.C.APP. § 402 (e) (1) (D) (Supp. 1946).

Juvenile Court—Power and Jurisdiction. Two decisions handed down during 1953 appear to restrict the power of the juvenile court regarding the permanency of orders which that court may make.

RCW 13.04, pertaining to juvenile courts, would seem to have been specifically drawn. RCW 13.04.010 defines dependency and delinquency under twenty separate subsections. RCW 13.04.020 makes dependent or delinquent children wards of the state, subject to control of the court. RCW 13.04.100 gives the juvenile court power to commit a dependent or delinquent child to an institution or association which will find a home for him, with a proviso that such *committing order* may be "permanent or temporary" and may be revoked or modified. RCW 13.04.140, however, specifies that no delinquent or dependent child may be taken from its parents or legal guardian unless the juvenile court finds one of three separate grounds.[24] RCW 13.04.150 provides that any order made in the case of a dependent or delinquent child may be changed, modified or set aside at any time.

In the case of In re *Sickles*,[25] the juvenile court found the child a dependent child within the definition of RCW 13.04.010(8),[26] and after a hearing, made an order permanently depriving the parents of custody of this child. The Supreme Court remanded on the ground that the *condition* of dependency under which the child had been declared a ward of the court was not such that the court had the power to *permanently* sever the natural parental relationship between the parents and their child.

Two judges concurred in the result, but contended that the juvenile court can make a permanent order regarding custody on any finding of dependency defined in RCW 13.04.010, if the court also finds one of the three conditions set forth in RCW 13.04.140. As the minority pointed out, in the case of In re *Miller*,[27] handed down in 1952, the Supreme Court affirmed an order permanently depriving a father of custody, and temporarily depriving the mother of the same, where the dependency of the child was determined under the same subsection of RCW 13.04.010 discussed in the principal case.

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[24] (1) Parent, parents or guardian is incapable or has failed or neglected to provide maintenance, training and education for the child; (2) child has been on probation, and has failed to report; (3) welfare of the child requires that its custody shall be taken from the parent or guardian.

[25] 42 Wn.2d 17, 252 P.2d 1063 (1953).

[26] "Whose home by reason of neglect, cruelty or the depravity of its parents or either of them, or on the part of its guardian, or on the part of the person in whose custody or care it may be, or for any other reason, is an unfit place for such child; . . ."

[27] 40 Wn.2d 319, 242 P.2d 1016 (1952).

The *Miller* case, and cases cited therein,[28] seem to have been decided on a question of fact: whether or not the acts of the parent had been such as to denote complete depravity with no hope that there might be such a reform as would in the future warrant his or her again having custody of the child. Perhaps the principal case might also have been decided on its facts alone, as the minority suggests, rather than reading into the juvenile court statutes a restraint not obviously intended by the legislature, nor apparently previously considered by the courts.

In the second case handed down in 1953 regarding the juvenile court, In re *Walker*,[29] the Supreme Court held the juvenile court had gone beyond its power in awarding custody of a delinquent child to its mother for a period of one year, on the grounds that the dependency status might cease at any time during that year, and therefore, the juvenile court could not attempt to maintain a dependency status *absolutely* during any set period of time. It would seem that in this instance, the court has not taken into account the provisions of RCW 13.04.150 permitting modification of orders,[30] which is the safeguard in the event the dependency status ceased during that period.

The *Walker* case also involves the jurisdiction of a court in a divorce action over the custody of children who have been previously declared wards of the juvenile court. The Supreme Court noted that the decision of the divorce court was not before it at this time, since there was here no appeal from the ruling to hold in abeyance the matter of custody of the children until such time as they were no longer wards of the juvenile court. However, it commented by way of dicta that the divorce court had without doubt made the proper decision in that case, pointing out that "any order which it (the divorce court) might have made would have been a conditional one, pending or subject to termination of the dependency status of the children."[31]

No authority is cited for this statement, but it is interesting in the light of Ex rel. *Marmo*, [32] which would seem to be completely contradictory on this point. There, after the award of custody in a divorce case to the mother, the father had the child declared dependent and a ward of the juvenile court. He subsequently petitioned the divorce court for a modification of the decree which would award custody of

[28] Particularly *In re* Day, 189 Wash. 368, 65 P.2d 1049 (1937).
[29] 143 Wash. Dec. 655, 263 P.2d 956 (1953).
[30] "Modification of Orders. Any order made by the court in a case of the dependent or delinquent child may at any time be changed, modified or set aside."
[31] *Supra* note 6, at 658, 263 P.2d at 959.
[32] 115 Wash. 154, 196 Pac. 577 (1921).

the child to him, and the question presented was which court had jurisdiction of the child. The Supreme Court said: "When the superior court[33] found the relator was a fit and proper person to have the custody of her, at that moment the child ceased to be a dependent or delinquent person, for whose protection the juvenile law was enacted."[34] This is a square holding on the direct issue of jurisdiction between the two courts. It cannot be presumed that the dicta in the principal case will overrule the *Marmo* holding.

ALICE D. HUBBARD

Grounds for Divorce—Insanity. In *Wolfe v. Wolfe*, 42 Wn.2d 834, 258 P.2d 1211 (1953), an action for divorce brought on the grounds of cruelty, the husband was granted a divorce by the trial court. The case was appealed by the wife (represented by her guardian ad litem), who, according to the evidence introduced at the trial, had been insane for more than two years preceding the commencement of the action. The Supreme Court reversed, holding that under RCW 26.08.020(10), where a party to a divorce action has been suffering from chronic mania for a period of more than two years prior to the beginning of the action, such insanity shall be the sole and exclusive ground upon which the court may grant a divorce, and that this statute is a defense to an action for divorce upon any other statutory grounds. This is the first case decided under this section of the Divorce Act of 1949, and is a literal application of the statute.

EVIDENCE

Witnesses—Competency of Insane Person. The court in *State v. Moorison*[1] affirmed the trial court's ruling that a person was a competent witness even though previously adjudicated insane by a Colorado court. The precise question had not previously been before the court.[2] The relevant Washington statute[3] excluding persons of unsound mind is merely declaratory of the common law. The present generally recognized common law interpretation is that an insane person is competent to testify if at the time of his presentation as a witness he understands the nature of an oath and is capable of giving a correct account of what he has seen and heard.[4] Dicta in the instant case indicated that competency also depends on mental capacity at the time of the events concerning which the witness is to testify.

The court further stated that competency is a matter within the discretion of the trial court to be determined by the use of a *voir dire*

[33] Reference is to Superior Court of Spokane County in which divorce proceedings and subsequent modification of divorce decree were had.

[34] *Supra* note 9, at 158, 196 Pac. at 578.

[1] 143 Wash. Dec. 21, 259 P.2d 1105 (1953).

[2] *Cf.* State v. Hardung, 161 Wash. 379, 297 Pac. 167 (1931); Summerlin v. Department of Labor and Industries, 8 Wn.2d 43, 111 P.2d 603 (1941) (guardian appointed).

[3] RCW 5.60.050.

[4] District of Columbia v. Ames, 107 U.S. 519 (1883).